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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ROY DURAN, JR., Defendant and Appellant.	2d Crim. No. B228532 (Super. Ct. No. 1284555) (Santa Barbara County)

Roy Duran, Jr., appeals the judgment following his conviction for second degree murder. (Pen. Code, § 187, subd. (a).) Duran claims there was insufficient evidence to support the conviction and instructional errors concerning the jury's consideration of out-of-court statements (CALCRIM No. 358) and voluntary intoxication. We affirm.

FACTS

During the early morning hours of August 9, 2008, George Robertson, an African-American, was shot and killed inside his car. Robertson's car was located near the driveway of his residence on South Railroad in Santa Maria.

A few hours earlier, Duran and his stepbrother Gilbert Garcia went to the Coachman Bar in Santa Maria. Garcia got into a verbal argument with Jason Ross. Garcia is Hispanic and Ross is African-American. When Garcia used a racial epithet to describe Ross, the two men began fighting. African-American males joined the fight on

Ross's side. Other people standing outside the bar also began fighting along racial lines, African-Americans against Hispanics. Garcia got the worst of the fight with Ross, and the African-Americans, who were in the majority, dominated the fighting in general.

Duran, an Hispanic, was present at the scene but did not join in the verbal argument between Ross and Garcia or the fist fight which ensued. Duran was wearing a white Raiders jersey.

Bianca Rodriguez and Duran lived next door to each other on West Las Flores Way in Santa Maria which was near the residence of victim Robertson. Rodriguez and Duran were in a sexual relationship and Duran generally spent the night with Rodriguez in her home. Rodriguez had known Robertson since her childhood. Rodriguez is African-American. A few days before the murder, Duran accused Rodriguez of sleeping with Robertson.

While Duran and Garcia were at the Coachman Bar shortly before the murder, Rodriguez called Duran who said he would come to her house in about an hour. When Duran did not arrive as planned, Rodriguez telephoned and texted him but received no response. During this time, Rodriguez's brother told Rodriguez that he had been in a fight with Garcia at the bar. Rodriguez reached Duran by telephone shortly after 2:00 a.m., and Duran told her he was angry because Rodriguez's brother was involved in a fight with Garcia outside the Coachman Bar. Duran hung up on Rodriguez.

Seconds later, Rodriguez heard two gunshots that sounded like they came from her driveway. She looked out her window and saw Garcia with a gun. She also saw Duran nearby. Approximately 15 minutes later, Rodriguez saw Duran and Garcia moving towards Robertson's home from opposite sides of the street. Duran was still wearing a white Raiders jersey. Garcia was wearing a white shirt and jeans, and was holding a gun. After she heard nine or ten gunshots, Rodriguez saw Duran and Garcia running away. Rodriguez sent text messages to Duran asking how he could "be so stupid" and later asked whether he was "okay."

A witness saw two men on the side of the street. One of them was wearing a football jersey. The other was holding something in his hand. The witness drove away

when the two men started running towards his car. Other witnesses saw two men running towards a house on West Las Flores Way where Duran lived. One of the men was wearing a white T-shirt and the other was wearing dark clothing.

Police found Robertson slumped over in the driver's seat of his car with the engine still running. Robertson had died from a gunshot wound. Police recovered 12 bullet casings in the area and one casing a short distance away. All the bullet casings had been fired from the same gun.

Duran and Garcia did not show up for their work shifts on Monday, August 11, 2008, and did not contact their employers to provide an explanation. Garcia was arrested on August 15, and Duran was arrested in October 2008.

DISCUSSION

Substantial Evidence Supports Murder Conviction

Duran contends there was insufficient evidence to support his conviction for second degree murder on the theory that he aided and abetted Garcia. Duran claims there was no evidence he had knowledge of Garcia's intent to kill Robertson or intended to aid and abet Garcia in committing the murder. We disagree.

In assessing the sufficiency of evidence, a reviewing court considers the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence, that is, "evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Burney* (2009) 47 Cal.4th 203, 253.) We presume all facts in support of the judgment which could be deduced from the evidence, and do not reweigh the evidence or redetermine credibility. (*People v. Wilson* (2008) 44 Cal.4th 758, 806; *People v. Martinez* (2003) 113 Cal.App.4th 400, 412.) Reversal is warranted only if there is no substantial evidence to support the conviction under any hypothesis. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

A person aids and abets the commission of a crime when he or she commits, encourages or facilitates its commission with knowledge of the unlawful purpose of the perpetrator and the intent or purpose of committing, encouraging, or

facilitating the offense. (*People v. Beeman* (1984) 35 Cal.3d 547, 560-561.) The prosecution relied on both a direct aiding and abetting theory and the natural and probable consequence theory. Under the natural and probable consequence theory, an aider and abettor may be guilty not only of the target crime, but also of any other crime the perpetrator commits that is a natural and probable consequence of the intended crime. (*People v. Medina* (2009) 46 Cal.4th 913, 920.) It is not necessary that the aider and abettor actually foresaw the additional crime, only that it was reasonably foreseeable. (*Ibid.*)

No particular factor is dispositive in establishing knowledge and intent; the court must look at the totality of the circumstances. (*People v. Medina, supra*, 46 Cal.4th at p. 922.) "Among the factors which may be considered . . . are: presence at the scene of the crime, companionship, and conduct before and after the offense." (*In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094; see also *In re Juan G.* (2003) 112 Cal.App.4th 1, 5.) Merely being present at the scene of a crime or failing to prevent it, however, are not sufficient. (*People v. Durham* (1969) 70 Cal.2d 171, 181.)

Here, substantial evidence supports a finding that Duran aided and abetted the murder under both direct aiding and abetting and natural and probable consequence theories. Evidence shows that Duran and Garcia acted in concert beginning with the fight in the Coachman Bar. Duran and Garcia were angry over the fight which had strong racial overtones. Also, Duran was angry with Robertson because he thought Robertson had had sexual relations with Duran's girlfriend. In addition, evidence shows that Duran and Garcia travelled together from the bar to the area in which Robertson lived. They approached Robertson together and evidence shows that Duran knew Garcia was carrying a gun. The evidence also shows that, after the shooting, Duran and Garcia ran away together to Duran's home.

No Instructional Error Regarding Out-Of-Court Statements

Duran contends the trial court erred by instructing the jury that it did not have to view a recorded out-of-court statement with caution. (CALCRIM No. 358.) He forfeited this claim by failing to seek modification of the instruction in the trial court.

(*People v. Guerra* (2006) 37 Cal.4th 1067, 1138.) We consider the claim on its merits, however, because Duran argues that failure to request a modification constituted ineffective assistance of counsel. We disagree with his claim of instructional error and, therefore, reject his claim of ineffective assistance of counsel.

A police-recorded telephone call between Bianca Rodriguez and her sister Cynthia Lyons on the morning after the murder was played to the jury. During the telephone call, Rodriguez told Lyons that she had seen Duran that morning and Duran, "just looked at me and uh . . . just looked at me, he was just like 'I'm sorry nigger.' I was just like . . . and he just left."

The trial court instructed the jury with CALCRIM No. 358 which states: "You have heard evidence that the defendant made oral or written statements before the trial. You must decide whether the defendant made any of these statements, in whole or in part. If you decide that the defendant made such statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statements. [¶] Consider with caution any statement made by the defendant tending to show his guilt *unless the statement was written or otherwise recorded*." (Italics added.)

Duran argues that, because the telephone conversation was recorded, the instruction may have misled the jury into believing it did not have to consider with caution statements *attributed to Duran* by Rodriguez as her recollection of what Duran had told her. A defendant who contends that an instruction is subject to an erroneous interpretation by the jury must show a "reasonable likelihood that the jury understood the instruction in the way asserted by the defendant" and caused the jury to misapply the law. (*People v. Cross* (2008) 45 Cal.4th 58, 67-68.) Duran fails to make this showing. The instruction states that the jury need not consider with caution a recorded statement of the defendant's own voice and words, but does not exempt from the cautionary language a recorded statement by someone else that attributes words to the defendant. The instruction's reference to "any statement made by the defendant" which has been recorded is clear and unambiguous. "It is fundamental that jurors are presumed to be intelligent

and capable of understanding and applying the court's instructions." (*People v. Gonzales* (2011) 51 Cal.4th 894, 940.)

No Error in Voluntary Intoxication Instructions

Duran contends the trial court erred in failing to instruct the jury that it could consider the effect of voluntary intoxication on Duran's mental state. We disagree.

An instruction permitting the jury to consider voluntary intoxication must be given when requested by the defendant if there is substantial evidence a defendant was intoxicated and the intoxication affected whether he or she actually formed the specific intent required for the offense. (*People v. Williams* (1997) 16 Cal.4th 635, 677; *People v. Verdugo* (2010) 50 Cal.4th 263, 295; *People v. Horton* (1995) 11 Cal.4th 1068, 1119.) Because the mental state required for aider and abettor liability is specific intent to aid and abet, a voluntary intoxication instruction should be given in aider and abettor cases subject to the same substantial evidence requirement. (See *People v. Mendoza* (1998) 18 Cal.4th 1114, 1131.)

"'Substantial evidence is evidence sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.'" (*People v. Lewis* (2001) 25 Cal.4th 610, 645.) The mere fact that a defendant consumed alcohol or drugs before the offense without a showing of the effect of the alcohol or drugs is normally not sufficient to warrant an instruction. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1241.)

Here, there is no substantial evidence of voluntary intoxication. There was no eyewitness testimony regarding any behavior by Duran that indicated intoxication. (See *People v. Payton* (1992) 3 Cal.4th 1050, 1057, 1060; *People v. Kaurish* (1990) 52 Cal.3d 648, 695-696.) There is only evidence that Duran drank some beer at a bar before the murder and Rodriguez's impression that Duran was drunk during a brief telephone conversation. Such evidence does not rise to the level of substantial evidence and does not permit a reasonable inference that the consumption of alcohol had any effect on Duran's ability to formulate specific intent to aid and abet. (*People v. Williams, supra,* 16 Cal.4th at pp. 677-678.)

Duran also contends the trial court erred in instructing the jury that voluntary intoxication was not a defense to assault. We conclude that any error was harmless.

Generally, evidence of voluntary intoxication is inadmissible to negate the intent required for general intent crimes such as assault. (*People v. Atkins* (2001) 25 Cal.4th 76, 81.) As we have stated, however, aider and abettor liability requires the person to act with the specific intent to commit, encourage or facilitate the offense. (*People v. Mendoza, supra,* 18 Cal.4th at p. 1123.) Accordingly, voluntary intoxication is relevant to the required mental state of an aider and abettor even if the target crime is a general intent crime. (*Id.* at pp. 1131-1134.)

Here, the trial court's instruction that voluntary intoxication is not a defense to assault, although generally accurate, may have been misleading with respect to the specific intent required for aiding and abetting liability. Nevertheless, as we have stated there is no substantial evidence of voluntary intoxication and, therefore, no prejudicial error.

The judgment is affirmed.

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PERREN, J.

We concur:

GILBERT, P.J.

COFFEE, J.*

* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Edward H. Bullard, Judge

Superior Court County of Santa Barbara

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